

IN THE IOWA DISTRICT COURT FOR LEE COUNTY NORTH - FORT MADISON

HAYES MENKE 9 LLC,
Petitioner,

v.

IOWA UTILITIES BOARD,
Respondent.

CASE NO. CVEQ007575

**RESPONDENT IOWA UTILITIES
BOARD'S PRE-ANSWER MOTION TO
DISMISS, MOTION FOR MORE
SPECIFIC STATEMENT OR TO
RECAST THE PETITION AND MOTION
TO ENLARGE TIME TO TRANSMIT
CERTIFIED RECORD**

COMES NOW Respondent Iowa Utilities Board (Board), by and through its undersigned counsel, pursuant to Iowa Rules of Civil Procedure 1.421 and 1.1602, and Iowa Code section 17A.19(6), and for its Pre-Answer Motion to Dismiss, Motion for More Specific Statement or to Recast Petition, and Motion to Enlarge Time to Transmit Certified Record, respectfully states as follows:

I. PRELIMINARY STATEMENT.

1. On July 13, 2023, Hayes Menke 9 LLC (Menke LLC) filed a Petition for Judicial Review of the Respondent Iowa Utilities Board (IUB or Board) Order Addressing Applications and Motions, Issuing Permit, and Granting Confidentiality issued on June 14, 2023, and the Board's Final Decision and Order issued April 26, 2023, *in In re: NuStar Pipeline Operating Partnership, L.P.*, Docket No. HLP-2021-0002.

2. In Docket No. HLP-2021-0002, the Board granted NuStar Pipeline Operating Partnership L.P.'s (NuStar) petition for a hazardous liquid pipeline permit.

3. The Board subsequently denied Menke LLC's Application for Rehearing and Reconsideration in its June 14 order.

4. Thereafter, John M. Hayes initiated this court proceeding by filing the petition for judicial review with the caption, “Hayes Menke 9 LLC (An Iowa Limited Liability Company represented by John M. Hayes, a member thereof authori[z]ed to act on behalf of Hayes Menke 9 LLC.” Hayes is not licensed to practice law in the state of Iowa.¹

5. The 34-page petition for judicial review contains 32 pages of narrative that consists of unnumbered paragraphs followed by two pages listing eight Iowa Code section 17A.19(10) grounds, 17A.19(10)(a), (b), (c), (d), (e), (f), (g), and (h). There is no identified correlation of the 32 pages of narrative and the eight section 17A.19(10) grounds cited.

6. Because Hayes is not a licensed attorney, he cannot represent the corporation Menke LLC. Accordingly, the Board respectfully requests this Court dismiss the petition for judicial review.

7. Because Menke LLC does not claim or plead that it is aggrieved or adversely affected by the final agency action, the petitioner lacks standing and the Board respectfully requests this Court dismiss the petition for judicial review for lack of jurisdiction.

8. In the event the petition is not dismissed, the Board respectfully requests a more specific statement, or alternatively, that Menke LLC recast its petition to provide appropriate notice required for this appellate proceeding. This includes a properly pled basis for each section 17A.19(10) ground asserted.

¹ The undersigned searched the Iowa Judicial Branch’s attorney licensure website, and there is an entry for ‘John McPherson Hayes,’ an attorney from Tulsa, Oklahoma, who had previously obtained pro hac vice status.”

9. The Board further requests the period for transmitting the certified record be enlarged during the pendency of this court's review of its motions.

II. STATEMENT OF THE FACTS.

10. The Board is an administrative agency within the meaning of Iowa Code section 17A.2(1). See Iowa Code § 17A.2(1).

11. Pursuant to Iowa Code chapter 479B, NuStar filed a petition with the Board for a permit to construct, operate, and maintain a hazardous liquid pipeline in Iowa to transport anhydrous ammonia. The proceeding is *In re: NuStar Pipeline Operating Partnership, L.P.*, Docket No. HLP-2021-0002 (NuStar Docket).²

12. When Menke LLC filed for the first time in the NuStar Docket, it described itself as “a family enterprise with landowner's located in: Illinois, Wisconsin, Oregon, New[]York, Florida, Guatemala, Quad[]Cities.”

13. On November 4, 2022, the Board granted Menke LLC's Petition to Intervene. Board subrule 7.4(8)(a) provides that only licensed attorneys may represent corporations except with the consent of the board. (Iowa Admin. Code r. 199—7.4(8)(a)). Pursuant to the subrule, the Board granted its consent for John M. Hayes' representation of the corporation.

14. The NuStar Docket proceeded to hearing on January 9, 2023.

² Judicial notice may be taken of information contained on an executive branch agency's website. See *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 212-13 (Iowa 2020) (taking judicial notice of data posted on the Iowa Secretary of State's website). To the extent necessary to adjudicate the above-captioned motion, the Board requests the Court take judicial notice of the relevant underlying case filings and Board orders, which are available in IUB's EFS, Docket No. SPU-2023-0002, accessible at: <http://efs.iowa.gov/efs/ShowDocketSummary.do?docketNumber=HLP-2021-0002>.

15. The Board issued its Final Decision and Order on April 26, 2023, granting NuStar's petition for a hazardous liquid pipeline permit subject to the terms of the order, including but not limited to additional actions and documentation required of NuStar; and the Board retained jurisdiction.

16. In response, Menke LLC filed a May 8 objection to reopening of record, May 16 application for rehearing and reconsideration, and May 26 petition to stay pending judicial review.

17. The Board issued its June 14 Order Addressing Applications and Motions, Issuing Permit, and Granting Confidentiality. In part, the Board denied Menke LLC's Application for Reconsideration and Rehearing and denied its Petition for Stay.

18. On July 13, John M. Hayes filed a petition for judicial review with the caption, "Hayes Menke 9 LLC (An Iowa Limited Liability Company represented by John M. Hayes, a member thereof authori[z]ed to act on behalf of Hayes Menke 9 LLC." John Hayes signed the petition as a representative for Menke LLC.

19. The petition for judicial review consists of 36 pages with relevant highlights as follow:

a. Only the first two pages contain numbered paragraphs; the next 32 pages contain narrative in unnumbered paragraphs; and the remaining two pages merely list eight Iowa Code section 17A.19(10) grounds, 17A.19(10)(a), (b), (c), (d), (e), (f), (g), and (h);

b. There is an absence of any pleading, narrative, or claim otherwise that Menke LLC is aggrieved or adversely affected by the final agency action;

c. There is no correlation of the pages and pages of narrative to the section 17A.19(10) grounds for relief; and

d. The narrative meanders, alleges misstated standards such as on page 18, "erroneous finding of fact that is irrational, illogical, and wholly unjustifiable," and contains questionable judicial review claims such as on page 31 alleging that the Board erred in the inclusion of irrelevant information in its final decision.

III. MOTION TO DISMISS.

A. Menke LLC Does Not Have a Licensed Attorney as its Representative.

20. In judicial proceedings in Iowa, corporations can be represented only by a licensed attorney with very limited exceptions. *Hawkeye Bank & Tr., Nat'l Ass'n v. Baugh*, 463 N.W.2d 22, 25 (Iowa 1990). The Iowa Supreme Court adopted the general rule that absent statutory authority or compelling reasons not yet identified, a corporation may not represent itself through non-lawyer employees, officers, or shareholders. *Id.*; *Timberline Builders, Inc. v. Donald D. Jayne Trust*, 786 N.W.2d 873 (Table) 2010 WL 2383916, at *2 (Iowa Ct. of App. 2010). Corporations in Iowa judicial proceedings can be represented only by a licensed attorney.

21. Our Supreme Court intended to prohibit people who are not licensed as attorneys from practicing law and an attempt to do so is unauthorized. *Olsen v. State*, 829 N.W.2d 192 (Table), 2013 WL 541636, at *1 (Iowa Ct. App. 2013) (quoting *Yulin Li ex rel. Lee v. Rizzio*, 801 N.W.2d 351 359 (Iowa Ct. App. 2011)). A person who is not licensed as an attorney engages in the practice of law by exercising professional judgment and representing others before the courts. *Id.*

Although our state law allows pro se litigants to represent their own claims, it does not authorize pro se litigants to prosecute the claims of others. Lay people cannot be said to engage in pro se representation – representing themselves—when they advocate the claims of another.

Rizzio, 801 N.W.2d at 360.

22. Where a timely objection is made by opposing counsel before a judgment is rendered, dismissal of the petition is appropriate. See *Rizzio*, 801 N.W.2d at 363 (Iowa Ct. App. 2011) (voiding judgment for child due to non-attorney parent engaging in unauthorized practice of law); *Steensma v. Buysman, Inc.*, 919 N.W.2d 766 (Table), 2018 WL 2725320, at *6 (Iowa Ct. App. 2018) (any pleadings or motions filed on corporation's

behalf by non-attorney should have been stricken and considered void); *Olsen*, 829 N.W.2d 192, 2013 WL 541636, at *2 (proper remedy for unauthorized practice of law on appeal is dismissal of appeals of parties represented by non-attorney).

23. Because the petition for judicial review itself reflects Hayes' status as a non-attorney, it is undisputed that Hayes is not a licensed attorney authorized to represent a corporation, Menke LLC, in this proceeding. The proper remedy for his unauthorized practice of law is dismissal of Menke LLC's petition for judicial review.

B. Menke LLC Lacks Standing.

24. District courts exercise appellant jurisdiction over agency actions on petitions for judicial review. *Christiansen v. Iowa Bd. Of Educ. Examiners*, 831 N.W.2d 179, 186 (Iowa 2013). To invoke the district court's appellant jurisdiction, compliance with the statutory conditions is required. *Id.* at 186-187. Pursuant to Iowa Code section 17A.19(10), a person or party (1) who has exhausted all adequate administrative remedies and (2) who is "aggrieved or adversely affected" by agency action may seek judicial review of such agency action.

25. In this case, Menke LLC is not aggrieved or adversely affected according to the petition for judicial review which lacks any allegation or reference to this statutory condition. As a result, Menke LLC lacks standing and thus, the district court does not have jurisdiction and the petition should be dismissed.

IV. MOTION FOR MORE SPECIFIC STATEMENT OR TO RECAST PETITION.

26. In the event this Court does not dismiss Menke LLC's petition for judicial review, Menke LLC should provide a more specific statement or recast its petition with greater specificity and notice required for an appellate proceeding.

27. Notice pleading is not applicable to an appellate review proceeding under chapter 17A where the pleading requirements are more stringent than those of an original action. *Kohorst v. Iowa State Commerce Comm'n*, 348 N.W.2d 619, 621 (Iowa 1984). The respondent is entitled to know the exact nature of the claimed errors, and each error must be separately and distinctly stated so that the respondent can adequately prepare and respond. *Id.*

28. In this case, the petition for judicial review meanders in its allegations, misstates standards, includes irrelevant grounds for judicial review, and is not stated in a manner that ties the 32 pages of narrative with the eight Iowa Code section 17A.19(10) grounds cited, 17A.19(10)(a), (b), (c), (d), (e), (f), (g), and (h).

29. Given the state of the petition, the Board does not know the exact nature of the claimed errors. For this reason, Menke LLC should provide a more specific statement or recast its petition setting forth numbered paragraphs for each claim and its related alleged section 17A.19(10) ground for relief.

V. MOTION TO ENLARGE TIME TO TRANSMIT CERTIFIED RECORD.

30. Iowa Code section 17A.19(6) permits the district court to enlarge the time by which the agency must transmit to the reviewing court a certified copy of the entire contested case record. See Iowa Code § 17A.19(6).

31. The Board requests the period in which it must file the certified record be extended until this Court has an opportunity to review and rule on the Board's Motion to Dismiss or Motion for More Specific Statement or to Recast the Petition. In the event the Court denies the Board's Motion to Dismiss, the Board requests the deadline for the transmittal of the certified record be set as 30 days from the date of the Court's order.

WHEREFORE, the Respondent Iowa Utilities Board respectfully requests this Court grant the above-captioned pre-answer Motion to Dismiss given Mr. Hayes is a non-attorney and the proper remedy for his unauthorized practice is a dismissal of the petition or, alternatively, grant the Board's Motion to Dismiss due to Menke LLC's lack of standing. In the event the Court denies the motion, the Iowa Utilities Board respectfully requests this Court order Menke LLC to provide a more specific statement or recast its petition for judicial review to outline its claims and grounds for relief in a manner that meets appellate notice for the Respondent Iowa Utilities Board.

The Iowa Utilities Board also respectfully requests this Court set the deadline for the transmission of the certified record 30 days from the date of the order.

Respectfully submitted,

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**ALL PARTIES SERVED ELECTRONICALLY
THROUGH COURT EDMS.**